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Supreme Court of the United States

OCTOBER TERM, 1941.

No. 167.

SONKEN-GALAMBA CORPORATION, a corporation, and W. C. BERRY, Petitioners,

vs.

BUTLER IRON & STEEL COMPANY, INCORPORATED, a corporation, Respondent.

PETITION FOR WRIT OF CERTIORARI
and
BRIEF IN SUPPORT THEREOF.

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Supreme Court of the United States

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SONKEN-GALAMBA CORPORATION, a corporation, and W. C. BERRY, Petitioners,

vs.

BUTLER IRON & STEEL COMPANY, INCORPORATED, a corporation, Respondent.

PETITION FOR WRIT OF CERTIORARI.

May it Please the Court:

The petition of Sonken-Galamba Corporation, a corporation, and W. C. Berry respectfully shows to this Honorable Court:

A.

Summary of Matter Involved.

Butler Iron & Steel Company, Inc., as seller, sued Sonken-Galamba Corporation and W. C. Berry, as buyers

(R. 1-5), seeking damages for breach by the buyers of a contract for the sale of scrap iron and steel from certain condemned oil storage tanks located in Oklahoma and Kansas. Federal jurisdiction was based on diversity of citizenship (Pet. Sec. 1, R. 1, Finding of Fact 1, R. 19-20). Trial in the District Court without a jury resulted in a judgment against petitioners for $22,055.94 (R. 29-30).

The contract sued on is a Kansas contract (Conclusions 1 & 2, R. 26).

It was conceded at the trial by Butler's president (R. 84) that following breach of the contract by petitioners Butler had elected to resell the scrap covered by the contract, credit the net proceeds of the sale and hold the buyers for the difference (R. 84); also, it was conceded that a resale, pursuant to such election, had been made (R. 84, Ex. A, R. 46-49) and that subsequently, without notice to the buyers (R. 83) and for private reasons existing between Butler and the purchaser at such resale (R. 49-50; 83), the contract of resale had been cancelled (R. 49-50) and that Butler had thereafter, without notice to petitioners (R. 85-86), applied said scrap in filling certain commitments it had with others.

The price obtained by Butler on the resale (under the contract which it subsequently cancelled) was substantially in excess of what the Court found to be the market price at the time of breach.[1] The net proceeds realized

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[1]The difference is approximately $1,500.00. The Court found (R. 23, Finding XI) the market price on July 15, 1938, to be $6.00 per net ton f. o. b. cars at location and deducted 50 cents a net ton for loading, making a net market price of $5.50 per net ton. The resale contract to the Horwitz Iron & Metal Company was on the basis of $6.10 per net ton as is, where is (R. 46-49).

by Butler by subsequent application of the scrap on its own commitments to others was not disclosed.[2]

Butler, both by its petition and by the character and scope of its evidence, proceeded on the theory that it was entitled to recover the difference between the contract price and the market price at the time and place of breach. The District Court adopted Butler's views, holding that "resale is immaterial" (Conclusion of Law 3, R. 26) notwithstanding decisions of the Supreme Court of Kansas that when a buyer breaches a contract of sale and there is an election by the seller to resell, no recovery can be had on any other theory than the difference between the net proceeds of resale and the contract price, and this, even though the price on resale may in a particular case coincide with the market price.

The Circuit Court of Appeals, in affirming the judgment, held that in view of Butler's cancellation of the contract of resale there was no election to resell, a holding likewise directly in conflict with the decisions of the Supreme Court of Kansas.

Both courts have, therefore, proceeded to set at naught definite, well settled rules of law announced by the Supreme Court of Kansas fixing the basis upon which and the extent to which a buyer can be held liable for damages for breach of a contract of sale.

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[2]After the trial, Butler filed a paper with the Clerk (held by the trial court in making up the record for the appeal to be no part of the evidence (R. 207)) indicating that the scrap had been applied on contracts Butler had with the American Rolling Mills Company and that it had received a gross amount of $32,739.86. The contract price would have netted Butler $35,534.57, a difference of only $2,794.71. On the paper, however, Butler charged $22,588.12 for deductions. Whether the deductions are correct or warranted was not the subject of inquiry at the trial in view of Butler's theory adopted by the District Court.

There can be no real question as to the election of Butler to resell. Butler notified petitioners that it would resell the remaining scrap for the account of the buyers, credit the amount received and sue for the difference (R. 84, 188-189; 193-195).

Pursuant to such notice and intention, Butler undertook to sell said material and sent out letters to dealers stating that "Sonken-Galamba Corporation are not going to fulfill their contract with us and, therefore, *we are offering for sale* the balance of scrap material" (Exs. J. K, L, M, N, R. 59-60), and on July 30, 1938, entered into a formal, written contract of sale and did sell said material to Horwitz Iron & Metal Company (Ex. A, R. 46-49). The contract of sale was a formal document drawn by an attorney and sworn to before a notary public (R. 82).

According to Butler's president the contract was subsequently rescinded orally on August 7th or 8th because Mr. Horwitz requested it (R. 50, 80) but without notice to petitioners (R. 83).

Butler's president admitted:

> "I knew that my attorney had *given notice* some time after the 1st of July, toward the latter part of July, that he was going to *sell* the material for the account of the defendant and *credit the amount received and sue for the difference.* The reason I asked these bids from these various possible purchasers was pursuant to that notice that had been given to Sonken-Galamba and Berry that we were going to sell at private sale; this *sale that was made to Horwitz was pursuant to our intention to sell at private sale*" (R. 84).

B.

Statement of the Basis for Jurisdiction.

(a) The writ of certiorari is applied for under Rule 38 of this Court and Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925 (28 U. S. C. A., Sec. 347 (a)) and is the proper remedy.

(b) The date of the judgment of the United States Circuit Court of Appeals for the Eighth Circuit is April 30, 1941 (R. 219; Opinion same date, R. 211).

(c) The following cases also sustain the jurisdiction:

Erie Railroad Co. v. *Tompkins*, 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188, 114 A. L. R. 1487.

Ruhlin v. *New York Life Ins. Co.*, 304 U. S. 202, 58 S. Ct. 860.

Moore v. *Illinois Central Railroad Co.*, 311 U. S. , 61 S. Ct. 392.

C.

Questions Presented.

Can the courts of the United States in determining the liability and extent of liability of a buyer who has breached a Kansas contract of sale of personalty allow a recovery by the seller of the difference betwen the contract price and the market price in the face of a concession by the seller that following the breach it elected to resell, credit the proceeds and hold the buyer for the difference?

The Circuit Court of Appeals held that the measure of damages for breach of contract in the case at bar was the difference between the contract price and the market value of the goods; that the election

to resell and credit proceeds was consistent with the alternative remedy to sue for the difference between market price and contract price and constituted no election of remedies.

The Kansas Supreme Court in *Central Trust Co.* v. *Adams*, 107 Kan. 126, 190 Pac. 765, held that the remedies were inconsistent and that an election to resell and credit proceeds constitutes an irrevocable election of remedy which precludes the party from afterwards suing on any other basis.

Can such election be treated as of no effect because the seller, after resale, pursuant to such election, for reasons satisfactory to it permits a cancellation of the contract of resale?

Can recovery be had on any other basis than that announced by the Supreme Court of Kansas, namely, by pleading and proof of a fair resale pursuant to such election, full disclosure and crediting of the net proceeds of such resale and assertion of claim for the difference?

D.

Reasons Relied on for Allowance of the Writ.

1. The salutary rule announced by this Court that "the law to be applied in any case is the law of the State,"[3] except as to matters not now in question, places the duty on the courts of the United States to see that their judgments do conform to the law of the State. It is not enough for those courts to, as here, admit (Conclusions 1 and 2, R. 26) that the rights of the parties

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[3]**Erie Railroad Co. v. Tompkins**, 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188, 114 A. L. R. 1487;
Ruhlin v. New York Life Ins. Co., 304 U. S. 202, 58 S. Ct. 860;
Moore v. Illinois Central Railroad Co., 311 U. S. ....., 61 S. Ct. 392.

are subject to and governed by the Kansas law. They must, if the rule is to be made effective, freely and completely apply the law of the State as expounded and applied by the courts of the State. No diminution by pronouncement of exceptions inconsistent with the underlying reason of a State rule of law or already expressly repudiated by the state courts can be permitted.

2. Specifically the District Court and the Circuit Court of Appeals have failed to be bound by and to follow specific principles of law announced and applied by the Supreme Court of Kansas in such a situation as this; have disregarded and minimized the full force and effect of the decisions of the Supreme Court of Kansas; have rendered a decision involving a question of commercial law contrary to the manner in which the question would have been decided by the courts of Kansas.

Wherefore, your petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the United States Circuit Court of Appeals for the Eighth Circuit, commanding that Court to certify and to send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket, No. 11878, Civil, *Sonken-Galamba Corporation, a Corporation, and W. C. Berry, Appellants* v. *Butler Iron & Steel Company, Incorporated*, and that the said opinion and judgment of the United States Circuit Court of Appeals for the Eighth Circuit may be reversed by this Honorable Court, and that your petitioners may have such other and further relief in the premises as to this Hon-

orable Court may seem meet and proper; and your petitioners will ever pray.

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